The Solicitors' Journal

Vol. 94 September 2, 1950 No. 35

CURRENT TOPICS

Gray's Inn

THE many solicitors who have had and have offices in Gray's Inn have watched the substantial beginnings of rebuilding with great satisfaction. Although it is the property of a Bench of barristers, solicitors feel a kindred joy in the restoration of so much of the Inn's ancient traditions and glories. It is good to know that the Hall, which was destroyed in May, 1941, except for its four walls and the stained glass which was removed before the bombing, is being restored to an exact pattern of what it was, even to the magnificent hammer-beam roof for which it was justly famous. The builders, Messrs. Trollope and Colls, hope that the day of reopening the Hall, which Master of the Bench WINSTON CHURCHILL declared on the opening of the temporary library he did not expect to live to see, will be not later than September of next year. For reasons of geography, barristers have not practised from the chambers in the Inn, except perhaps during the war; and as and when new chambers rise from the ruins of the old it is to be hoped that solicitors will seek and be granted office accommodation there, thus helping in their way to maintain the legal traditions of the Inn.

Guardianship of Infants: Venue for Summary Proceedings

IN an article dealing with this subject which appeared at 93 SOL. J. 328, it was pointed out that the extension to summary courts in 1925 of the jurisdiction to make orders for custody and access under the Guardianship of Infants Acts, 1886 and 1925, had resulted in an ambiguity as to the proper venue for proceedings in courts of summary jurisdiction. The extension of jurisdiction was effected by an amendment of the definition of "the court" in s. 9 of the Act of 1886, which as originally enacted provided that the expression should mean the High Court or the county court "of the district in which the respondent . . . may reside." The Act of 1925 merely provided that the expression "the court" should "include a court of summary jurisdiction," without expressly limiting it to the court for the place where the respondent resides. It was suggested in the article in question that this omission justified the conclusion that, so far as summary proceedings are concerned, jurisdiction would attach where the children are or where the person having the legal custody is. However, in the recent case of *R.* v. *Sandbach JJ., ex parte Smith* [1950] W.N. 397, a Divisional Court of the King's Bench Division resolved the ambiguity in favour of the narrower construction, holding that the venue for such proceedings before magistrates is only where the respondent resides. The LORD CHIEF JUSTICE said that, in the opinion of the court, the intention of the Acts was that proceedings for custody under the Acts must be brought where the respondent, and not the applicant, lived.

Consolidation Acts

AMONG the large number of statutes which received the Royal Assent on 28th July last were several Acts continuing the notable progress recently made in tidying up the statute

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book by consolidation. They are all of practical importance to the solicitor, and one of them, the Arbitration Act, 1950, is now in operation, having come into effect on 1st September. The Act consolidates the Arbitration Acts, 1889 to 1934, but the repealed Acts continue to apply to arbitrations commenced before 1st September—that is to say, to cases where one party has before that date served on the other a notice to appoint or concur in appointing an arbitrator or requiring him to submit the dispute to a person designated in the arbitration agreement. Although the Act contains the usual provision as to the construction of documents referring to the repealed Acts, those who take a pride in correct drafting will remember that henceforth arbitration clauses, etc., should properly refer to the Act of 1950. Two more consolidation Acts of which the practitioner will shortly need to take account are the Adoption Act, 1950, and the Shops Act, 1950, both of which come into operation on 1st October next. The former replaces the Adoption of Children Acts, 1926 to 1949, and the corresponding Scottish legislation, and particular attention is directed to the transitional provisions contained in s. 46 and Sched. V. The latter, a specially useful piece of consolidation, replaces the nine statutes collectively known as the Shops Acts, 1912 to 1938, and certain other related provisions, including reg. 60AB of the Defence Regulations under which the present general closing hours of shops are regulated. Finally, the Matrimonial Causes Act, 1950, is due to come into operation on 1st January, 1951, after which date ss. 176 to 198A of the Judicature Act, 1925, the Matrimonial Causes Act, 1937 (except s. 11, which remains unrepealed), and sundry amendments made in various Acts from 1925 to 1949 will no longer encumber the office desk with bulky volumes when the law relating to divorce or nullity proceedings has to be considered. Relief from the physical labour of juggling with perhaps a dozen annual volumes of the statutes is, we consider, cheaply bought at the price of familiarising ourselves with the thirty-five new section numbers disguising the well known enactments now enclosed between the paper covers of this twenty-page Act.

Sale of Cars Let on Hire Purchase

THERE is evidence that the motor trade generally is alive to the implications of the statement by HILBERY, J., in the Divisional Court on 18th July that loss caused to innocent persons by the unauthorised selling of motor cars which are subsequently found to be subject to hire-purchase agreements could be lessened if an Act were passed making it obligatory for motor cars the subject of hire-purchase agreements to carry external indication of that fact. The trade periodical called *Garage*, of 19th August, quoted our comment in Current Topics (*ante*, p. 480) under the heading: "Registration Book Entry Suggested Again." There is every reason why the trade should seek an amendment of the law, and the most important is undoubtedly the protection of its members. One hundred and ten thousand vehicles of all kinds were registered with a voluntary organisation of traders, known as H.P.I., as being subject to hire-purchase agreements during 1949. In addition, there are, it is estimated, at least half as many transactions again which are not registered with H.P.I. The demand for protection was proved by the fact that during 1949 approximately 8,000 trade inquiries were made to H.P.I., and of this number it was found that 293, or 3·7 per cent., concerned vehicles which were still subject to hire-purchase agreements. The outstanding balance and liability on those 293 vehicles averaged £230 each. An idea of the potential loss may be obtained from these figures and from the fact that 110,000 vehicles equal 3·5 per cent. of the total licensed vehicles of all kinds. A short Act of Parliament might effect a great economy.

A Registration Scheme for Cars

A SCHEME which has been formulated, and is, we understand, actually under discussion at the present time, would require all registration forms to include an entry declaring the legal owner of the car, this entry to be made by the legal owner and not by the registered user, unless he is also the legal owner. The completion of this entry would be the responsibility of the purchaser, and he would not release the car to the registered user until the log book, with his, the legal owner's, name duly entered thereon, was received by him from the authorities. The information relating to the legal owner would also be entered on the records of the licensing authority. Duplicate log books would always bear the legal owner's name so that substitution of another log book would not cause the original entry to be lost. Applications for duplicate log books would have to be made by both legal owner and registered user where legal and registered rights were in different persons' names. Legal ownership could only be terminated upon the legal owner completing a declaration form to this effect, together with a new application form showing the new legal owner. Traders purchasing a car for resale would complete a "suspense" legal ownership form which would be held by the authorities until the car was sold. It is pointed out that the legal owner's title would be dependent on his completion of the appropriate forms and satisfying himself that the previously named legal owner had properly relinquished his rights. The scheme is well deserving of consideration, and it is for the trade itself to place it before the appropriate authorities.

Report on the Cremation Regulations

AN inter-departmental committee has published its report on the Regulations for Cremation. The increasing use of this method of disposal of human remains has rendered necessary a reconsideration of the safeguards imposed by the existing regulations made under the Cremation Act, 1902. When those regulations were made there were nine crematoria in England and Scotland and 444 cremations took place in the year. In 1935 there were 9,614 cremations; in 1940 there were 25,199; in 1945, 42,963; and in 1949, 79,607. There are now 58 crematoria, of which 37 belong to local authorities. Applications from local authorities for approval of over 100 new ones are before the Ministry of Health. The report has not concentrated solely on the possible destruction of evidence of crime, which was one of the chief objects of the existing regulations, but takes a broader view. For example, the present provision that no one who has left written directions to the contrary should be cremated should, it is proposed, be widened so as to prohibit cremation of the corpse of a person who was known in life to have held views inconsistent with cremation. The main representations that came before the committee were concerned with the procedure for medical certification, and the committee proposes that further details should be given than that there is no reason to suspect that the death was due to other than natural causes. It is also recommended that any suspicious case should be reported to the coroner by the doctor giving the independent confirmatory certificate, and that coroners should be empowered to authorise cremation after any accidental death, without waiting for termination of the inquest.

THE COAL MINING (SUBSIDENCE) ACT, 1950

THE 28th July, 1950, on which the Coal Mining (Subsidence) Act received the Royal Assent is, by a coincidence, exactly a year after the date on which the Minister of Fuel and Power stated in the House of Commons that after careful consideration of the report of the committee on Mining Subsidence (Cmd. 7637) the conclusion had been reached that legislation to implement the whole of the committee's recommendations would involve a number of difficult administrative problems and would have far-reaching financial implications which would require further study, but that the Government were aware of the need for action to alleviate the most serious hardships which occur owing to subsidence due to the mining of coal, and proposed to introduce legislation as soon as possible to provide a measure of compensation in respect of small dwelling-houses which suffer damage from this cause. The present Act is the outcome of that proposed legislation.

The report of the Committee on Mining Subsidence has already been epitomised (93 SOL. J. 156–157). The particular recommendation of that report with which the Act deals is that as regards dwelling-houses a right to compensation limited to the cost of repair should be granted retrospectively for all subsidence damage which became manifest on or since 1st January, 1947 (para. 96, head (*a*)). The reason for the retrospective nature of this recommendation is to be found in that part of the committee's report which refers to the hopes of owners and occupiers of dwelling-houses having been raised by the appointment, on 3rd January, 1947, of the committee, to which was added the following statement: "We cannot doubt that a deep disappointment and sense of injustice would be felt if those who have suffered uncompensated damage during recent years and particularly since our appointment were to be excluded from the benefit of our recommendations" (para. 94). The Act accordingly adopts the 1st January, 1947, as the date on and from which the occurrence of subsidence damage gives rise to a liability on the National Coal Board, though it limits its benefits to dwelling-houses of a rateable value not exceeding £32 in England and Wales and £52 in Scotland, the differentiation being due merely to the different methods of rating in the two countries. The Royal Commission on Mining Subsidence which reported in 1927 (Cmd. 2899) had recommended a somewhat similar approach to the problem, but their recommendation had been related to dwelling-houses of an annual value not exceeding £40. To put the limit at £32 rateable value is said to compare favourably with the £40 annual value limit, as in England and Wales the rateable value is arrived at by deduction of a sum which may represent as much as 40 per cent. of the gross annual value.

The unification of coal royalties by the Coal Act, 1938, and the nationalisation of the coal mining industry by the Coal Industry Nationalisation Act, 1946, simplified the problem with which the Act deals as coal and other minerals associated therewith became, on the 1st January, 1947, vested in the National Coal Board, and it is on that Board that the duty is placed of carrying out repairs or making payments in respect of subsidence damage to dwelling-houses to which the Act applies.

The Act defines "subsidence damage" as "structural damage caused by the withdrawal of support from land as the result of the working and getting of coal or any other mineral which is worked with coal, but does not include damage caused as the result of the working and getting of coal and other minerals, if the working and getting of coal is ancillary to the working of those other minerals" (s. 17 (1)). Structural damage is widely defined as meaning damage to any building or structure, or any sewers or drains, or any pipes, wires or other fixed apparatus installed for the purpose of supplying gas, electricity, water, heating or telephone services (*ibid.*).

By subs. (1) of s. 1 of the Act the subsidence damage for which the National Coal Board are made responsible is that occurring to or affecting any dwelling-house which at the time of the occurrence of the damage was a dwelling-house to which the Act applies, which by the next subsection is defined not only as a hereditament used wholly or mainly for the purposes of a private dwelling and having a rateable value not exceeding £32 in England and Wales (or £52 in Scotland) but also as a part of a hereditament as follows:—

(1) Any such separately occupied part of a hereditament as is used wholly or mainly for the purposes of a private dwelling, if the hereditament has a rateable value which, when divided by the number of parts of the hereditament which are separately occupied, does not exceed the above-mentioned £32 or £52, as the case may be.

(2) Such part of a hereditament, being a hereditament which is used partly (but not wholly or mainly) for the purposes of a private dwelling and falls within the above-mentioned rateable value limits, as is used for the purposes of a private dwelling.

It seems that (1) above covers the case of each of, say, five flats used for residential purposes in a building with a rateable value of not more than £160 in England, while an example of (2) above is where a part only of a building is used for residential purposes when the Act applies to that part if the whole building falls within the above-mentioned rateable value limits.

A hereditament, or part of one, is not to be deemed to have ceased to be used for the purposes of a private dwelling if temporarily unoccupied or unoccupied because rendered unfit for occupation by subsidence damage or used otherwise by virtue of requisitioning powers (s. 1 (3)).

The Minister of Fuel and Power may by order, with Treasury approval (such order being subject to an affirmative resolution of each House of Parliament), substitute a higher or lower rateable value limit having regard to any changes in the valuation of hereditaments for rating purposes. This provision is inserted in view of impending revaluations, so that the type of house now envisaged can be safeguarded if on revaluation it goes outside the present valuation limit (s. 1 (2)).

As regards subsidence damage which has occurred on or after the 1st January, 1947, and the repairs to which have been carried out before the passing of the Act, the National Coal Board are required to make a payment equal to the amount (if any) by which the cost reasonably incurred in so doing exceeds £5 (s. 2 (2)). This limit only applies to cases of repair between 1st January, 1947, and 28th July, 1950, and its purpose appears to be to cut out trivial claims of a retrospective nature. The general obligation of the Board is either to carry out as soon as possible such reasonable repairs to dwelling-houses to which the Act applies as are required in consequence of subsidence damage thereto occurring on or after the 1st January, 1947, or, if the Board think fit, to make a payment equal to the cost reasonably incurred by any other person in doing so (s. 2 (1)), subject to the limitation that if the cost would exceed the depreciation in the value of the dwelling-house caused by the damage the Board may, after consulting with the relevant local authority, instead of

repairing, confine the payment to the amount of the depreciation (s. 2 (3)). The reason for consultation with the local authority is to ensure that they and the Board are of one mind that to attempt repairs would not be an economical proposition. Hence, if a payment is made on the basis of the amount of the depreciation the recipient can be reasonably certain that he will not be faced with a notice to repair from the local authority under s. 9 of the Public Health Act, 1936.

Notwithstanding the above-mentioned provisions, the Board are to pay the cost reasonably incurred by any other person in executing, after the passing of the Act, works urgently required in consequence of subsidence damage or works reasonably required for temporarily meeting the circumstances created by that damage (s. 2 (4)).

The Coal Board's liability for subsidence damage may arise where the damage occurs to a part of a building not comprised in a dwelling-house if it affects another part of the building which is a dwelling-house within the meaning of the Act. In such a case the cost of carrying out the repairs is apportionable between the dwelling-house and the other part of the building in such manner as may be appropriate having regard to the extent and effect of the damage and all the circumstances of the case. This is subject not only to the provisions of the Act but also to any agreement between the Board and the owner of the building and any other interested party (s. 3 (1)).

Where the repair costs to a building of which a dwelling-house forms part would exceed the depreciation in value of the building the Board may in lieu of carrying out repairs to the dwelling-house or paying the repair costs pay a proportionate part of the depreciation in value of the building in the ratio which the annual value of the dwelling-house bears to the annual value of the building before the damage (s. 3 (2)).

The amount of the depreciation caused by subsidence damage is the amount by which the after-damage value (excluding any value attributable to rights arising under the Act in respect of the damage) is less than the value immediately before the damage, the value in each case being the amount which the dwelling-house might have been expected to realise on a sale in the open market with vacant possession and free from incumbrances but subject to any easements or other restrictions affecting the land at the relevant time (Sched., paras. 1, 2 and 3).

Where payments are made by the Board for the costs of carrying out repairs these are payable to the person or persons incurring such costs and are apportionable between two or more of such persons as may be agreed or in default of agreement in shares corresponding with their respective shares in the cost (Sched., para. 4).

Where the amount payable by the Board is by way of depreciation in value of a dwelling-house or of a building of which a dwelling-house forms part it is normally payable to the owner, which means the fee simple owner or, where the premises are held under a ground lease, the ground lessee. If, however, any other person is liable to make good the whole or part of the damage it is payable in whole or in part to that person (Sched., para. 5). Further, provision is made for payment in such cases to a mortgagee where the Board are satisfied that the interest in the dwelling-house or building of a person otherwise entitled to receive the payment is subject to a mortgage. The amount so paid is to be treated in the same way as if it had been proceeds of sale arising under the mortgagee's power of sale (Sched., para. 6). There seems, however, to be no machinery under the Act for notifying the Board of a mortgagee's interest. It would seem that these depreciations in value payments would normally only be made where the house is so old or in such a bad state of repair as not to warrant any money being spent on it. Where this state of affairs exists and subsidence damage occurs it behoves the mortgagee to notify the Board of his interest, particularly as the regulations with regard to the making of claims do not provide for giving notice as to mortgage interests.

The Board's liability to repair or to pay the cost of subsidence damage is dependent upon their being given notice in writing of the occurrence of the damage in such manner, within such time and containing such particulars as may be prescribed by regulations made by the Minister of Fuel and Power under s. 16 of the Act (s. 5 (1)). These regulations were made on the 28th July, 1950 (S.I. 1950 No. 1271) and are entitled the Coal Mining (Subsidence) (Notices) Regulations, 1950. By s. 16 of the Act they are subject to annulment in pursuance of a resolution of either House of Parliament. They provide that the time within which a notice of the occurrence of subsidence damage must be given for the purposes of s. 5 (1) of the Act shall be—

(*a*) in the case of damage which occurred before the passing of the Act, six months from the passing of the Act, and

(*b*) in the case of damage which occurs after the passing of the Act, two months from the occurrence of the damage.

The Minister of Fuel and Power or the Board may on written application extend the time in any case in which it appears to him or them that there is a reasonable ground for the notice not being given within the prescribed time or that the liabilities of the Board in respect of the damage have not been substantially increased by the notice not having been given within that time (reg. 1 (2)).

Since by s. 14 (1) of the Act the rights conferred by the Act are alternative to other rights and a notice given under s. 5 (1) is deemed to be an election to exercise the rights conferred by the Act, it seems obvious that a person whose property has suffered subsidence damage and who may have rights apart from as well as under the Act should be allowed sufficient time within which to obtain legal advice whether any compensation to which he may be entitled under the title deeds relating to his property would be more advantageous to him than the rights conferred by the Act, and, therefore, that if the prescribed time is in any case insufficient for this purpose this should be regarded as a reasonable ground for not giving the notice within that time.

As it is the notice under s. 5 (1) of the Act and not an application for an extension of time under the regulations which constitutes an election under s. 14 (1) to exercise the rights conferred by the Act, it seems desirable that an extension of time should be applied for in any case where delay is likely to be experienced in examining the title deeds for the purpose of determining whether to rely on the rights thereunder or to take advantage of the provisions of the Act.

The s. 5 (1) notice must, by the regulations, be given in the form set out in the schedule to the regulations or in a form containing the like declaration and information (reg. 2).

The form requires the following information to be supplied :—

(1) Address of damaged property.

(2) Nature of property.

(3) Rateable value of dwelling-house.

(4) Date when damage first appeared. Brief description of damage (e.g., walls cracked, windows jammed, etc.).

(5) If damage occurred before 28th July, 1950, and has been repaired (*a*) date of repair (month and year) ; (*b*) name and address of builder who did repairs.

(6) Whether the person giving the notice is the owner of the property, and if not (*a*) whether such person is a ground lessee or a tenant liable to make good the damage; (*b*) the name and address of the owner.

(7) If the person giving the notice occupies the property, the days and times (mornings or afternoons) on which it can be inspected.

The form concludes with a declaration by the person giving the notice that to the best of his knowledge and belief the information is true and that he understands that by giving the notice he chooses his rights under the Act to require the Board to carry out repairs or to make a payment in respect of the damage instead of any right he may have apart from the Act to claim damages or compensation from the Board in respect of the damage.

The notice may be served by delivering it at, or sending it by post addressed to, any office of the Board (reg. 3; see also *ante*, pp. 509, 522).

The Act itself provides for the notice to be given by the owner of the dwelling-house or part of the building to which subsidence damage has occurred or any other person who is liable to make good the damage in whole or in part and for the Board to be given reasonable facilities to inspect the premises in so far as the person giving the notice is in a position to do so (s. 5 (1)).

Except as regards works urgently required in consequence of subsidence damage or works reasonably required for temporarily meeting the circumstances created by that damage, the Board are not liable for repairs carried out by any other person after the passing of the Act unless that person has given the Board at least fourteen days' notice in writing before starting the repairs with adequate particulars of the proposed repairs and such reasonable facilities as he can give for inspection (s. 5 (2)). There is no prescribed form for this kind of notice, and it is not to be confused with the notice required to be given under s. 5 (1), though the regulations do provide that the notice, like the s. 5 (1) notice, may be served by delivering it at, or sending it by post addressed to, any office of the Board (reg. 3).

Where, after notice of subsidence damage is given under s. 5, any further damage occurs before permanent repairs are carried out or before it is determined that a depreciation in value payment falls to be made, as the case may be, the original and the further damage are to be treated as one, with the result that the notice of the original damage is effective also in respect of the further damage (s. 7).

The Board are given power to execute preventive works with the owner's consent, and if consent is unreasonably withheld their liability does not extend to damage which could have been prevented nor to so much of the damage as could have been reduced if permission to execute the preventive works had been forthcoming (s. 8).

The Board also have powers of entry to inspect and execute works on property to which the Act applies where under any lease or tenancy (other than a ground lease) the landlord has similar powers of entry for carrying out repairs, and where such landlord's powers do not exist such powers can be conferred on the Board by a court of summary jurisdiction (s. 9).

Penalties are imposed on persons who furnish false information or, with intent to deceive, withhold material information for the purpose of obtaining any benefit under the Act (s. 10).

Grants are payable out of the Exchequer to the Board of one-half of the additional expenditure incurred by the Board by virtue of the Act, with a limit of £1,500,000 for the period to the end of 1952 and of £250,000 per annum thereafter (s. 11).

Questions arising under the Act are to be determined by the county court and in making orders giving effect to its determinations the court may, in particular, require the Board to carry out their statutory obligations within a specified period and award damages for their failure to do so within a reasonable time (s. 12).

In any proceeding under the Act the onus is on the Board to show that damage is not subsidence damage where it is shown that the nature of the damage and the circumstances are such as to indicate that the damage may be subsidence damage (s. 13).

Where, before the passing of the Act, the Board have made a payment or executed works in full satisfaction of a pre-Act obligation to make good or pay damages or compensation for subsidence damage, other than one calculated by reference to the weight or area of the coal or other mineral, the working of which caused the subsidence, no right is conferred by the Act against the Board in respect of that damage (s. 14 (2)).

Any payment in respect of subsidence damage made by the Board before the passing of the Act otherwise than in full satisfaction of such a pre-Act obligation must be refunded or brought into account by any person who exercises a right under the Act in respect of that damage (s. 14 (3)).

Regulations may prescribe the payments which may be made by the Board for reimbursing the expenses incurred by any person for the purpose of securing the carrying out of the Board's obligations (s. 15). It would seem, however, that all expenses likely to be incurred are already provided for in the various sections of the Act and this is probably the reason why the regulations which have been made do not deal with this matter.

F. A. E.

THE COMPETENCY OF WITNESSES IN CRIMINAL TRIALS

Prima facie, all witnesses are competent and compellable to give evidence for prosecution or defence in a criminal trial, but to this rule there are certain exceptions, which will be dealt with later in this article. When any question arises as to the competency of a witness, it is for the judge, or in a court of summary jurisdiction the magistrate, to decide. This may be done by examining the witness on the point, which is called the *voire dire*, or by other evidence. An objection for incompetency can be made at any time during the trial, but ought as a rule to be taken before the witness has been examined in chief unless it is only during the course of his examination that any question of incompetency arises. If evidence has been given by a witness who is thereafter held to be incompetent, the judge (or magistrate) may stop the examination and strike his evidence out of the notes; the case must then be tried on the evidence of the other witnesses alone, without regard to that of the incompetent witness, and the jury should be directed accordingly (*R.* v. *Whitehead* (1866), 14 L.T. 489).

Incompetence may arise from want of discretion in the witness, or in certain cases from his or her relationship to the accused. An idiot is wholly incompetent; a lunatic is, however, a competent witness during a lucid interval, and it is the duty of the judge (or magistrate) to ascertain whether he is of competent understanding to give evidence, and is also aware of the nature and obligation of an oath; if so, then the witness should be sworn and examined, but the value of his testimony, as opposed to the admissibility of it, is a

matter for the jury. The same principle applies to deaf and dumb witnesses, who are competent to give evidence provided that they can understand and make themselves understood by writing or signs; for this purpose a sworn interpreter may be used, as in the case of witnesses who speak and understand only a foreign tongue.

The competency of an infant depends not on his age but on his understanding, and an infant who appears sufficiently to understand the nature and moral obligation of an oath is competent as a witness. When, however, the infant, though not understanding the nature of an oath, understands the duty of speaking the truth and is sufficiently intelligent to justify the reception of his evidence, it may be received though not on oath, subject to the qualification that his evidence on behalf of the prosecution is not to be sufficient to support a conviction unless corroborated by other material evidence implicating the accused (Children and Young Persons Act, 1933, s. 38). The court should make due inquiry as to whether the provisions of this section are satisfied, and this should be done in the presence of the prisoner and of the jury; in a recent case, when evidence as to the child's capacity was given by a school attendance officer in the absence of the jury, the conviction was quashed (*R.* v *Reynolds* [1950] 1 All E.R. 335).

Principals, accessories, and accomplices are competent witnesses for or against each other, and in strict law require no corroboration; but obviously the fact that a witness is an accomplice in the crime charged detracts very materially from his credit. Consequently, when an accomplice gives evidence for the prosecution, it has long been the practice for the judge to warn the jury of the danger of convicting an accused on the evidence of an accomplice unless it is corroborated, and in his discretion to advise them not to convict on such evidence, though he should at the same time point out that they are in law entitled to convict on it if they choose, after paying due attention to his warning. In fact, this practice has now become virtually a rule of law, and if the judge omits to give this warning a conviction on the uncorroborated evidence of an accomplice will generally be quashed on appeal (*R.* v. *Tate* [1908] 2 K.B. 680). Corroboration need not cover every point in the witness's evidence, but must be such as to confirm not only the evidence by the accomplice that the crime has been committed, but also the evidence that it was the accused who committed it (*R.* v. *Baskerville* (1916), 12 Cr. App. R. 81); this case also approved a previous decision that the evidence of one accomplice cannot be corroborated by the evidence of another.

Since it is a general principle of the criminal law that no one can be compelled to criminate himself, it follows that an accused person cannot be called as a witness for the prosecution against himself. When, however, a defendant is jointly indicted with other persons, he is a competent, though not a compellable, witness for the prosecution against any of his co-defendants if (*a*) a *nolle prosequi* has been entered in respect of the charge against him, on the fiat of the Attorney-General; or (*b*) he has already been tried and acquitted; or (*c*) he has pleaded guilty to the offence charged; or (*d*) though jointly indicted, he is not being tried with the defendant against whom he gives evidence. In *R.* v. *Payne* (1949), 94 SOL. J. 116, the Court of Criminal Appeal approved a previously existing practice of sentencing a defendant who has pleaded guilty before allowing him to be called by the prosecution as a witness against his co-defendants. Such a witness is of course an accomplice in the crime charged against his co-defendants, and the jury should therefore be directed in the terms stated above as to the danger of convicting on his uncorroborated evidence for the prosecution.

By the Criminal Evidence Act, 1898, s. 1, a defendant is a competent witness in his own defence in every case, if he applies to be called as a witness, and he ought to be distinctly told by the court of trial that he has a right to give evidence on his own behalf (*R.* v. *Warren* (1909), 73 J.P. 359). If, however, the defendant does not give evidence, the prosecution may not comment on the fact, though the judge may do so in his discretion (*R.* v. *Rhodes* [1899] 1 Q.B. 77, 83). The defendant, if he gives evidence, may of course be cross-examined in such a manner as to criminate him as to the offence charged, otherwise there would be no object in cross-examining him at all; but he may not be asked any question tending to show that he has committed, or been convicted of or charged with, any other offence, or is of bad character, unless (1) the proof that he has committed or been convicted of such other offence is admissible to show that he is guilty of the offence with which he is charged; or (2) he or his advocate has questioned the prosecution witnesses, or has given evidence with a view to establish his own good character, or the defence involves imputations on the character of the prosecution or the prosecution witnesses; or (3) he has given evidence against any other person charged with the same offence.

Questions arise from time to time as to whether the husband or wife of the defendant can be called as a witness in criminal proceedings. The common law position was that, except in proceedings affecting the person or property of the spouse, and possibly in treason cases, he or she could not give evidence against the other in criminal proceedings. The law is now as follows:—

(1) The spouse of the defendant is now both competent and compellable as a witness for either side, without the consent of the defendant (*a*) in proceedings for the protection of the property of the spouse (Criminal Evidence Act, 1898, s. 4; Married Women's Property Acts, 1882, ss. 12 and 16, and 1884, s. 1); and (*b*) in proceedings for enforcing a civil right only, for non-repair of a highway or bridge, and for committing a nuisance on a highway, bridge, or river (Evidence Act, 1877, s. 1).

(2) The spouse of the defendant is competent, but not compellable, as a witness for either side, without the consent of the defendant, in the cases set out in the Schedule to the Criminal Evidence Act, 1898; in proceedings for any offence under the Vagrancy Act, 1898, e.g., living on immoral earnings; importuning for an immoral purpose (Criminal Law Amendment Act, 1912, s. 7 (*b*)); and in prosecutions for bigamy (Criminal Justice Administration Act, 1914, s. 28 (3)). The Schedule to the Act of 1898 relates to the offences of neglect to maintain or desertion of wife or family; rape, indecent assault, abduction; all offences within the Criminal Law Amendment Act, 1885, such as gross indecency; incest; carnal knowledge of a mental defective; child destruction; and all the offences within Sched. I to the Children and Young Persons Act, 1933.

(3) The spouse of the defendant is both competent and compellable for the prosecution, at common law, in proceedings for causing personal injury to the spouse; forcible abduction and marriage; and possibly also in cases of treason.

(4) The spouse of the defendant is a competent, but not a compellable, witness for the defence in all criminal proceedings, on the defendant's application (Criminal Evidence Act, 1898, s. 1). If, however, the spouse is not called as a witness, the prosecution may not comment on the fact, though the judge may do so in his discretion, as in the case of the failure of the defendant personally to give evidence.

(5) If two or more persons are jointly indicted and tried, then the spouse of one of the defendants can give evidence (*a*) for the prosecution against any of the co-defendants in any case where he or she can give evidence without the consent of the accused spouse (i.e., in cases (1), (2) and (3) above); (*b*) for the defence of the co-defendants with the consent of the accused spouse in any case, and without his consent in the cases covered by the Schedule to the Criminal Evidence Act, 1898 (see (2) above); and (*c*) for or against any of the co-defendants if the accused spouse has either pleaded guilty, or been convicted, or is not being jointly tried.

In all these cases, if the spouse is in fact called as a witness, he or she will be subject to cross-examination by the Crown, or by the defendant inculpated, as the case may be (*R.* v. *Hardwen* [1902] 1 K.B. 882).

E. G. B. T.

A Conveyancer's Diary

GRANTS IN RESPECT OF SETTLED LAND

At this quiet time of the year there is leisure to examine cases which are constantly accepted in their result, but seldom considered—and sometimes even misunderstood—in their detail. One of these cases is a decision more often referred to, perhaps, in opinions on conveyancing matters than any other on the property legislation of 1925 (*Re Bridgett and Hayes' Contract* [1928] Ch. 163).

The facts were very simple: By her will A, who died in 1875, appointed three persons as her executors and trustees, and she devised her realty to these persons upon trust to pay the rents and profits thereof to X for life, and after X's death, in the event (which happened) of X dying without leaving children, upon trust for sale, with various trusts as to the proceeds of sale which are not material to the decision. Two of the trustees of A's will died before the 1st January, 1926, and on that date only one, T, was living. The beneficiary, X, died on the 17th January, 1926, having by her will appointed Bridgett to be the sole executor thereof, and in due course Bridgett obtained a general grant of probate to X's estate. He then contracted, as X's personal representative, to sell to Hayes certain premises which formed part of A's trust estate. Hayes objected to the title on the ground that, under s. 22 (1) of the Administration of Estates Act, 1925, X should be deemed to have appointed the surviving trustee of A's will, T, to be her special executor in regard to settled land, and that it was necessary to have the general grant to Bridgett revoked in so far as it related to land settled by A's will, and for a grant of probate limited to such land to be obtained by T, who could then make title.

Section 22 (1) of the Act, on which the purchaser's argument centred, runs as follows:—

> "A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to settled land.
>
> "In this subsection 'settled land' means land vested in the testator which was settled previously to his death and not by his will."

On these facts, and in view of this provision, Romer, J., held that Bridgett could make a good title to the premises. The decision falls into two distinct parts, either of which would have been sufficient to decide the case before the learned judge.

In the first place Romer, J., observed that it was common ground that the legal estate in the premises had passed to Bridgett as from the date on which he had obtained probate. Reference was then made to s. 204 (1) of the Law of Property Act, 1925, which provides that an order of the court under any statutory or other jurisdiction is not, as against any purchaser, to be invalidated on the ground of want of (amongst other things) jurisdiction, whether the purchaser had notice of any such want or not. The probate court had granted probate of X's will to Bridgett, and its order in granting probate was within s. 204 (1), and a purchaser was protected by that provision. Further, the purchaser would be protected in the event of any subsequent revocation of that grant (assuming that such a revocation was possible by reason of the grant having been made to the wrong person) by s. 37 (1) of the Administration of Estates Act, 1925, which provides that all conveyances of any interest in either real or personal estate made to a purchaser by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation of the probate or administration. While the probate which Bridgett had obtained remained unrevoked, therefore, Bridgett could convey the legal estate which admittedly had devolved upon him; and if that probate should be revoked, the purchaser had statutory protection under s. 37 (1).

The learned judge then went on to consider the question whether s. 22 (1) of the Administration of Estates Act, 1925, applied, it having been conceded that on X's death the settlement created by A's will had come to an end. On this question the reasoning of the decision may be quite shortly summarised as follows: The persons deemed to have been appointed the deceased's special executors are the persons who are at his death the trustees of the settlement; before a person can go to the probate court and obtain a grant specially limited to settled land under this provision he must be able to say that he was, at the death, a trustee of the settlement; if, therefore, the settlement has come to an end with the deceased's death, there is no person in a position to make that statement, and the provision is, consequently, inapplicable to such a case.

Now, strictly speaking, this part of the decision is *obiter*, the case having already been disposed of on other grounds; and it seems almost impossible to imagine any case in which a similar question can arise which would not be covered by the first part of the decision in this case. The protection afforded by s. 204 (1) of the Law of Property Act, 1925, is afforded to a purchaser (i.e., a purchaser for value: *ibid.*, s. 205 (1) (xxi)); but it is only a purchaser in this sense who could have raised, or could ever again raise, such a point for decision. The practice which has been founded on this case is quite unassailable, if it rested on the first ground of its decision alone.

On the alternative ground, it may at first sight appear that to say, "no settlement, no trustees, therefore no person to take advantage of s. 22 (1)" is to put an unduly narrow interpretation on the expression "settlement" in a case such as occurred here, where on the cesser of the settlement the land became immediately subject to a trust for sale, and the trustees for sale were the persons who, immediately before the commencement of the trust, had been the trustees of the settlement. But this view overlooks the extremely sharp

distinction which is drawn all through the 1925 legislation between, on the one hand, settlements, and, on the other, trusts for sale of land—a distinction which did not exist before 1926, when land held on trust for sale was settled land, but upon which rests the conveyancing technique of the present day. With this distinction in mind the actual decision on the applicability of s. 22 (1) to the case which arose in *Re Bridgett and Hayes' Contract* cannot be questioned on the ground that it is based either on a misconstruction or on a too rigid construction of that provision.

"A B C"

Landlord and Tenant Notebook

RENT TRIBUNALS: WITHDRAWAL

RENT tribunals are now responsible for administering two Acts of Parliament: the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949. The question whether, and if so when and how, a party who has instituted proceedings under either of those statutes may withdraw them is not an easy one. In *R.* v. *Wanstead, etc., Rent Tribunal, ex parte Clarke*, reported in *The Times* of 27th July last, in which the conduct of the respondents came in for much sharp criticism at the hands of the Divisional Court, a right to withdraw an application made under the Landlord and Tenant (Rent Control) Act, 1949, was freely referred to in the judgment delivered by Lord Goddard, C.J. The case was one in which certiorari was sought and the application for such was not opposed, which makes it a little difficult to find the *ratio decidendi*, but I think that the only possible conclusion is that the tribunal had acted without jurisdiction because the application to determine the reasonable rent of the premises concerned had been withdrawn by the tenant who had made it.

It appeared that the tenant had taken part of a house belonging to a friend of his, the respondent in the proceedings before the tribunal and applicant for a writ of certiorari; that after he had applied for a determination of rent he had come to terms with his landlord and informed the tribunal that he did not wish to proceed. A hearing must have been demanded by one of them, and on the morning of the day fixed members of the tribunal went to inspect the premises. The tenant was not there; the landlord said the matter had been withdrawn, but they proceeded to inspect all the same and induced the landlord to attend the hearing, at which they reduced the rent. According to the judgment, and presumably to the landlord's affidavit, the members of the tribunal had intimated to him that he might incur penalties if he did not admit them to the premises and did not attend the hearing and there produce figures relating to his outgoings. It is right to mention that this was publicly denied the next day, and it would seem from this alone that counsel who, instructed by the Ministry of Health, appeared for them had no instructions on this point. This has subsequently been confirmed by a news item which appeared in *The Times* of 10th August; members of the tribunal were feeling rather like a motorist whose solicitor, or whose insurers' solicitor, has taken upon himself to admit negligence without reference to the assured.

But what is puzzling about the case from the *ratio decidendi* point of view is not so much a recognition of a right to withdraw as references in the judgment to such right being conferred or regulated by rules. For a perusal of the Landlord and Tenant (Rent Control) Regulations, 1949, and of the Act under s. 6 (5) of which they were made shows no express reference to withdrawal of application in either measure. It is true that the Furnished Houses (Rent Control) Act, 1946, s. 2 (2), expressly contemplates withdrawal: "Where any contract to which this Act applies is referred to a tribunal, then, unless at any time before the tribunal have entered upon consideration of the reference it is withdrawn by the person or authority by whom it is made, the tribunal shall consider it . . ."; likewise proviso (*b*) of s. 5 reduces the automatic "security of tenure" in the event of withdrawal; but the Furnished Houses (Rent Control) Regulations, 1946, provide no special machinery for exercising such right, and it is still a moot point what exactly is meant by "before the tribunal have entered upon consideration of the reference."

There could, I submit, be no objection to the recognition of an inherent right to withdraw an application under the Landlord and Tenant (Rent Control) Act, 1949; the position is not comparable to that obtaining in the case of a prosecution (see the Prosecution of Offences Act, 1879, s. 5: clerk's duty to transmit papers to the Director of Public Prosecutions) to which the parties are not the prosecutor and the defendant but the Crown ("on the prosecution of . . .") and the defendant. The position may also be considered different in the case of proceedings under the Furnished Houses (Rent Control) Act, 1946: for not only may such proceedings be instituted by someone who is not a party to the agreement (the housing authority), but they are by reference, not application, and the tribunal is directed to set about its task on inquisitorial rather than on the normal English accusatorial lines. The words "after making such inquiry as they think fit" in s. 2 (2) of the Furnished Houses (Rent Control) Act, 1946 ("Where any contract to which this Act applies is referred to a tribunal, then, unless . . . it is withdrawn . . . the tribunal shall consider it and, *after* making such inquiry as they think fit, and giving each party . . . an opportunity of being heard . . . shall approve the rent payable . . . or reduce it . . ."), have no counterpart in the Landlord and Tenant (Rent Control) Act, 1949. Though in both cases results are registered with the local authority, the proceeding under the more recent statute is of a more private nature, and it may be that there is no reference to withdrawal because it was thought unnecessary to make special provision for such a step.

There are other differences between the two Acts which may be in point. As regards nature of subject-matter, it is not just that one statute deals with furnished and the other with unfurnished lettings; the Landlord and Tenant (Rent Control) Act, 1949, is concerned only with certain tenancies of houses with standard rents, i.e., within the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, rateable value therefore being a factor, while the Furnished Houses (Rent Control) Act, 1946, affects any contract whereby one person (called the "lessor") grants to another person (the "lessee") the right to occupy as a residence a house or part of a house in consideration of a rent which includes payment for the use of furniture or for services (s. 2 (1)), and not only is rateable value immaterial but lodgers as well as tenants are entitled to the benefit of the Act.

Another difference is this: under the Furnished Houses (Rent Control) Act, 1946, the "lessor" is obliged, the sanction being "a fine not exceeding £20 or imprisonment for a period not exceeding three months or both such fine and such imprisonment," to comply with a notice given by the tribunal

to give them such information as they may reasonably require regarding particulars relating to the contract (ss. 2 (1), 9 (2))—the respondent to an application under the Landlord and Tenant (Rent Control) Act, 1949, may remain uncommunicative with impunity as far as criminal law is concerned, though, of course, a tribunal may well draw adverse inferences if he does. But, again, the difference is one that suggests that if an applicant wishes to discontinue he has, even though Act and rules say nothing about it, every right to withdraw his application.

It is clear from *R.* v. *Brighton and Area Rent Tribunal, ex parte Marine Parade Estates* (1936), *Ltd.* (1950), 94 SOL. J. 339 (and see *ante*, p. 348), that the main function of a rent tribunal is valuation, and it was no doubt convenient, when the Landlord and Tenant (Rent Control) Act, 1949, was enacted, to entrust (by s. 6) the work to tribunals already operating under the Furnished Houses (Rent Control) Act, 1946. It was also to be expected, their functions being as described, that they would readily resort to inspection when discharging them. Normally, of course, a tenant will gladly facilitate such an inspection. But the denial of pressure wrongfully exercised in the case of *R.* v. *Wanstead, etc., Rent Tribunal, ex parte Clarke*, would not be an answer to an allegation of trespass which, according to the judgment, members of the tribunal had committed on that occasion. For, while the applicant or "lessee" in the case of a reference under the Furnished Houses (Rent Control) Act, 1946, may be a lodger, whose landlord has access to his rooms, the Landlord and Tenant (Rent Control) Act, 1949, affects tenants only, and the tribunal had no right to inspect the premises without the knowledge and consent of their applicant (at common law a landlord may not even enter in order to do repairs: *Barker* v. *Barker* (1829), 3 C. & P. 557); the only possible justification would have been a right reserved by the landlord to show members of the local rent tribunal over the demised premises.

R. B.

HERE AND THERE

AS YOU WERE

THE approaching reopening of the House of Commons proper a couple of months hence, the return of the elected representatives to the site hallowed by their deliberations since the first building of the Victorian Palace of Westminster, their moving into possession of the bigger and better Chamber which they owe to the destructive zeal of our late enemies, will bring to life an interesting constitutional problem touching the exercise of the appellate jurisdiction of the House of Lords. Among those who understand it, the problem has slumbered uneasily for some time past. The bulk of practitioners, to whom the ways and doings of the members of our highest legal tribunal are an esoteric mystery, unsearchable and unknowable, are so far unaware of any difference of opinion. This is what it's all about. The Commons have been sitting in the Lords' chamber and the Lords in the King's Robing Room. Most people are aware of that. The rest of the story is less well known. It was decided that the Houses of Parliament needed a nice new up-to-date boiler-house and that it should be sunk beneath the level of the Embankment Gardens. This involved a lot of noisy pile-driving just below the windows of the King's Robing Room. The pile-driving without and the business of the chamber within could not proceed simultaneously. So to leave the contractors free to carry on the job without the peril of committing a breach of privilege, the Law Lords agreed to go somewhere else and sit in committee to hear appeals argued, sitting in the House only to deliver their decisions. For this purpose they moved to a nice quiet committee room overlooking the Thames and in that agreeable situation, disturbed only occasionally by the usual noises off of the river traffic, they have brought their minds to bear on divers weighty matters submitted for their consideration.

THE APPELLATE COMMITTEE

FROM the point of view of counsel there was quite a lot to be said for this accidental change. For one thing, they had a good deal more room to spread themselves and their books than they had ever enjoyed either in the original or in the temporary chamber. For another, hearings could proceed smoothly on consecutive days without the former mid-week interruption when the Law Lords were obliged to evacuate the House to leave it free for legislative business. But in matters of this sort the obvious is hardly ever the whole story nor even the most important aspect of it. The Lords of Appeal in Ordinary are not only judges. They and, of course, the Lord Chancellor and the ex-Lord Chancellors too have a recognised legislative function to perform. When a new enactment is passing into law it is for them to ensure that its legal implications are properly considered. But if it were to become the established practice for them to sit on an Appellate Committee while the House was sitting legislatively, that whole side of their function would suffer a total eclipse. Another point—under the former practice it was normal for the Lord Chancellor to preside at the hearing of appeals. Accordingly he could not be other than a man of the highest legal attainments. Should it ever become normal for him to take no part in the judicial work of the House, it might well be that in time the Lord Chancellorship would be open to any political candidate, perhaps nominally a member of the legal profession, perhaps not even that. The office would fall to the level of a mere Ministry of Justice in which legal qualifications were no more requisite than is military knowledge at the War Office. Finally, to confine the Law Lords simply to judicial functions would strengthen the hands of those who would abolish the House of Lords altogether. One argument for its retention is that it provides a final court of appeal, but let the appellate jurisdiction be regularly exercised in a watertight compartment and the abolitionists will say: "Very well, let the Law Lords continue to hear appeals. The abolition of the Upper House need not affect them, for they are already separated from its legislative functions."

WARNING NOTE

SUCH are the wider constitutional implications. Lord Simon appreciated them immediately and sounded a warning note. Everyone, including the Lord Chancellor, agreed that the Appellate Committee should be regarded as a mere temporary expedient necessitated by extraordinary circumstances, but it has gone on functioning. After the pile driving, it was repairs to the Royal Gallery. Lord Simon has steadily refused to take any part in its proceedings and Lord Jowitt, between presiding in the Chamber and dealing with administrative work, has appeared in it but rarely. What will happen when the Lords return to their proper home? We shall see soon.

RICHARD ROE.

Mr. HAROLD RICHARD BOWMAN SHEPHERD has been appointed Solicitor-General of the County Palatine of Durham.

Mr. A. R. M. OSMAN, Additional Substitute Procureur General, Mauritius, has been appointed Puisne Judge in Mauritius.

Mr. A. J. BROUGHTON, clerk to the Warrington magistrates, is to succeed Mr. Francis Walsh as clerk to the Oxford City magistrates.

Mr. C. G. BUTCHER, assistant solicitor to Stockport Corporation, has been appointed assistant solicitor to Leicester Corporation.

NOTES OF CASES

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

CONSPIRACY: APPEAL OF ONE CONSPIRATOR ALLOWED

Dharmasena *v.* R.

Lord Porter, Lord Oaksey, Lord Radcliffe, Sir John Beaumont and Sir Lionel Leach. 18th July, 1950

Appeal from the Court of Criminal Appeal of Ceylon.

The appellant and another were convicted by a jury of conspiracy to murder. The appellant was also convicted, on the second count of the indictment, of murder. The Court of Criminal Appeal of Ceylon dismissed the appeals of the appellant, but allowed that of his fellow prisoner to the extent of ordering a new trial. At that trial the appellant's fellow prisoner was found not guilty, the jury stopping the case. This appeal was accordingly instituted.

LORD PORTER, giving the judgment of the board, said that for one of two alleged conspirators to be found guilty by one jury and the other acquitted by another was an impossible result where conspiracy was concerned. It was well established law that if two persons were accused of conspiracy and one was acquitted the other must also escape condemnation. Two, at least, were required to commit the crime of conspiracy; one alone could not do so. True, one conspirator might be tried and convicted in the absence of his companions in crime: see *R.* v. *Ahearne* (1852), 6 Cox, 6; but, where two had been tried together so that the only possible verdict was either that both were or that neither was guilty, an order for the retrial of one made it imperative that the other should also be retried. Therefore if two persons were accused of a criminal conspiracy and convicted, and, on appeal, one could be, and was, sent for retrial, the other should be sent at the same time for retrial also on that charge so that both might be convicted or acquitted together. The proper course was to treat the subsequent acquittal as a disposal of the charge of conspiracy and as involving the acquittal of the appellant also on that charge. The appeal against conviction on that count should accordingly be allowed. The conviction of the appellant of murder, however, remained. There was ample evidence on which the jury could convict him on that charge. Appeal dismissed.

APPEARANCES: *Granville Sharp*, K.C., *Dingle Foot* and *R. Millner* (*Darley, Cumberland & Co.*); *F. Gahan* and *J. G. Le Quesne* (*Burchells*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

HOUSE OF LORDS

WORKMEN'S COMPENSATION: "CHANGE . . . IN RATES OF REMUNERATION"

Railway Executive *v.* Culkin

Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord Reid and Lord MacDermott. 21st July, 1950

Appeal from the Court of Appeal.

In 1944 the respondent workman was injured while at work as a railway loader. He was thereafter employed as a mess-room attendant and received workmen's compensation as for partial incapacity. For fifty-two weeks before the accident he had earned 76s. a week for a basic week of forty-eight hours. By 30th July, 1945, the basic rate of 76s. a week had been increased to 89s., and Sunday rates increased to time and three-quarters. The workman's weekly compensation was as from that date duly recalculated (and increased) under s. 6 (1) of the Workmen's Compensation Act, 1943. From 30th June, 1947, a forty-four hour week was introduced for railway workers, and the basic rate for loaders was increased to 96s. 6d. a week. The loaders, however, agreed to work a forty-eight hour week, the four extra hours counting as overtime. Thus they now received for a forty-eight hour week, not the standard rate, but that rate plus a sum for overtime. The respondent workman applied for recalculation under s. 6 (1) as from 30th June, 1947. The Railway Executive recognised only the increase of basic rate from 89s. to 96s. 6d., but the workman contended that the true weekly increase could only be ascertained by reference to what a loader now received for a given number of hours as compared with his pre-accident earnings, i.e., $\frac{96s.\ 6d.}{44}$=2s. 2¼d. an hour, as compared with $\frac{76s.}{48}$=1s. 7d. an hour. The county court judge held that the rate of remuneration remained the same (apart from increase in basic rate), and that the only change, apart from that increase, was in the number of hours worked after 30th June, 1947. The Court of Appeal held that there was a change in rates within s. 6 (1) entitling the workman to recalculation, and the executive now appealed. The House took time for consideration.

LORD SIMONDS said that it was conceded by the employers that they could not succeed if *Shaw* v. *Rootes Securities, Ltd.* (1948), 92 SOL. J. 391; 64 T.L.R. 520, had been rightly decided. There the Court of Appeal gave s. 6 of the Act of 1943 a meaning which the employers now challenged. Somervell, L.J., dissenting, however, had concluded that there was no change in the rates of remuneration within the meaning of the section. He was right, and his reasoning was applicable to the present case. The basic rate of remuneration here was a weekly rate. In every relevant contractual document it was so referred to, either expressly or in terms which made it clear that it was a weekly rate. No doubt it was necessary for many purposes, in order to calculate the amount of wages due to a workman at the end of the week, to break down the weekly rate to an hourly sum, but this method of calculation did not affect the fact that the basic rate was a weekly and not an hourly rate and that the sums due for special duty were ascertainable by reference to the weekly rate. The workman's wages were made up of his basic weekly wage and payments for overtime, night duty and Sunday duty, each paid for at the appropriate rate. The county court judge would ask whether any and which of these rates had been changed since the accident or (for the purposes of this case) since the last recalculation. The basic rate had here been increased by 7s. 6d., but no other rates had been increased. He must base his calculation on that increase. The judge must then turn to the pre-accident weekly earnings made up of wages for ordinary duty and for special duty. The amount due for special duty was ascertained by aggregating all the hours worked in a week. To the hours of ordinary duty were added the hours of special duty equated at the appropriate rate (e.g., four hours' overtime equalled five hours' ordinary time) and the sum which was ascertained by dividing the weekly rate by the number of hours in the standard week was multiplied by the aggregate number of hours. If the only increase had been an increase in the weekly rate, the arbitrator had nothing else to do than to apply the new increased rate instead of the old rate to the same number of hours. If there had been an increase in some other rate, say for Sunday duty, the arbitrator must make a further adjustment. An alteration of working hours would, no doubt, result in hours, which before the accident were ordinary hours, becoming after it overtime hours; but that was no justification for treating the hours which were actually worked before the accident as being other than what they in fact were. A mere change in the hours of a working week where no question of overtime was involved would not constitute a change in the rate of remuneration. The workman's claim therefore failed.

LORD NORMAND, LORD MORTON OF HENRYTON and LORD REID agreed.

LORD MACDERMOTT dissented. Appeal allowed.

APPEARANCES: *Beney*, K.C., and *R. W. Payne* (*M. H. B. Gilmour*); *Paull*, K.C., and *R. M. Everett* (*Pattinson and Brewer*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF APPEAL

GAS ARBITRATION TRIBUNAL: EXTENT OF JURISDICTION

O'Meara *v.* South-Eastern Gas Board

Somervell and Denning, L.JJ. 30th June, 1950

Appeal from Parker, J., in Chambers.

On 28th December, 1945, an agreement was made between the plaintiff and the company employing him under which, he said, he would have been entitled to a life annuity. On 1st May, 1949, the company's undertaking became vested in the defendant board by virtue of Pt. II of the Gas Act, 1948. The board disclaimed the agreement under s. 22. The Gas Arbitration Tribunal (see s. 63) revoked the disclaimer. The plaintiff then sued the board on the agreement; but they contended that the tribunal had exclusive jurisdiction in the matter under s. 36 (5). By s. 36 (1) the section is to apply where on or after 23rd January, 1948, an agreement, which was unnecessary or imprudent, was entered into by an undertaking which later became nationalised. By s. 36 (2) and (3) the board concerned may apply to the Gas Arbitration Tribunal "in respect of any transaction to which in the opinion of the board this section applies," and the tribunal may act in the matter unless they are satisfied that the agreement fulfils certain conditions. By s. 36 (4) the board can apply to the tribunal in respect of loss caused by the disclaimed agreement, "being an agreement . . . entered into . . . after 23rd January, 1948," to the undertaking taken over. By s. 36 (5) in all these matters concerning transactions of the kind in question "the tribunal shall have exclusive jurisdiction." The board contended that that section gave the tribunal exclusive jurisdiction to determine matters connected with the agreement of 28th December, 1945, because s. 36 (5), unlike s. 36 (4), did not repeat the limiting date, 23rd January, 1948, specified in s. 36 (1). Parker, J., reversing the master, so held, and the plaintiff appealed.

DENNING, L.J., said that s. 36 (1) defined the cases to which the whole section applied: transactions or agreements entered into after 23rd January, 1948; and subs. (5) must be limited to those cases. The agreement here was made on 28th December, 1945. It had been contended that, as in s. 36 (4) it was thought necessary to repeat the limitation of date, in subs. (5) there was no such limitation. That argument had force; but clear words would be required to oust the jurisdiction of the High Court. The tribunal had not exclusive jurisdiction over this agreement as it was dated 28th December, 1945. It was clear that the courts had jurisdiction over (1) agreements which were not disclaimed at all, and (2) agreements which were rightfully disclaimed when the disclaimer was not challenged. It would be strange if the courts had no jurisdiction when an agreement was wrongfully disclaimed. The courts had jurisdiction to entertain this case.

SOMERVELL, L.J., agreed. Appeal allowed.

APPEARANCES: *Gerald Gardiner*, K.C., and *M. Lyell* (*Timothy Hales*); *Gerald Upjohn*, K.C., and *Megaw* (*Slaughter & May*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

INCOME TAX AND PROFITS TAX: PROFIT ON BOOK DEBT

Reynolds & Gibson *v.* Crompton
Same *v.* Inland Revenue Commissioners

Eversheds, M.R., Singleton and Jenkins, L.JJ. 14th July, 1950

Appeal from Roxburgh, J. (*ante*, p. 352).

A firm of cotton brokers were owed £200,000 for cotton supplied to a limited company. On a change in the constitution of the firm on 1st October, 1938, the new firm was treated for income-tax purposes as if a new trade had been set up (Income Tax Act, 1918, Sched. D, Cases I and II Rules, r. 11 (1), proviso, as amended by s. 32 (1) of the Finance Act, 1926). On a further reconstruction of the firm the proviso to r. 11 (1) was not invoked. By 1st October, 1938, the debt had been reduced to £174,600. The reconstituted firm took it over for £124,600. Between them that firm and the further-reconstituted firm eventually collected the whole debt, thus realising between them £50,000 profit on their purchase of the debt. The Special Commissioners held the two firms properly assessed to income tax and profits tax on that sum. Roxburgh, J., affirmed that decision, and the firms appealed. (*Cur. adv. vult.*)

EVERSHED, M.R., said that he was not prepared to dissent from the view of his brethren that the appeal should be allowed.

SINGLETON, L.J., said that the firms relied strongly on the finding that neither of them traded in book debts. The Crown submitted that that was a finding of fact that the balance of the debt remained a debt on revenue account. He agreed with Roxburgh, J., that, whatever the position had been earlier, as from the time when the debt was acquired by the reconstituted firm, it became a capital asset purchased out of capital. He was unable to agree that the finding of the Special Commissioners was equivalent to a finding that the profit in question arose from the utilisation of circulating capital in the trade. He did not see that this debt in the hands of these firms could be described as circulating capital in any sense. There was nothing to show that it had any connection with the trade or business of either firm. In *Golden Horse Shoe (New), Ltd.* v. *Thurgood* [1934] 1 K.B. 548, at p. 563, Romer, L.J., when discussing the difference between fixed and circulating capital, said: "The determining factor must be the nature of the trade in which the asset is employed." Therein lay the importance of the finding that neither firm traded in book debts. Having regard to the isolated nature of the transaction, to the finding that neither firm dealt in book debts, and to the lack of anything to show that the debt was in any way connected with the trade or business of either firm, he (Singleton, J.) would not say that the £50,000 fell to be treated as part of the profits or gains of the firms. Such part of the profits as was made by either firm accrued not by reason of its trade or by reason of its carrying on the business of cotton brokers, but because of the acquisition of a debt. The position would have been the same had the reconstituted firm acquired at a low figure a debenture which was ultimately paid in full. The appeal should be allowed.

JENKINS, L.J., agreed. Appeal allowed.

APPEARANCES: *Cyril King*, K.C., and *J. H. Bowe* (*Lightbounds, Jones & Co.*); *F. Grant*, K.C., *R. P. Hills* and *P. M. B. Rowland* (*Solicitor of Inland Revenue*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

WORKMEN'S COMPENSATION: TRANSITIONAL PERIOD

Holloway *v.* Mobberley & Perry, Ltd.

Bucknill, Somervell and Denning, L.JJ. 28th July, 1950

Appeal from Stourbridge County Court.

For thirty years before 11th October, 1946, the claimant workman was employed by the respondents as a miner. From that date until May, 1949, he was engaged in the woodworking industry. On 29th August, 1949, he was certified by a medical board under the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, to be incapacitated by pneumoconiosis from 17th May, 1949. The appointed day under the National Insurance (Industrial Injuries) Act, 1946, was 5th July, 1948. That Act introduced a new scheme for the compensation of industrial injuries. By s. 89 (1) of that Act "workmen's compensation shall not be payable in respect of any employment on or after the appointed day, and accordingly" the Workmen's Compensation Acts "are hereby repealed as from that day . . . Provided that" those

Acts " shall continue to apply to cases to which they would have applied if this Act had not been passed, being cases where a right to compensation arises or has arisen in respect of employment before the appointed day, except where, in the case of " diseases including pneumoconiosis " the right does not arise before the appointed day, and the workman, before it does arise, has been insured under this Act against that disease . . ." By s. 55 (1) " a person who is under this Act insured against personal injury caused by accident arising out of . . . his employment shall be insured also against any prescribed disease . . . being a disease . . . due to the nature of that employment and developed on or after the appointed day." The workman now appealed from the decision of the county court judge that the Workmen's Compensation Acts, by virtue of the Act of 1946, no longer covered his case. (*Cur. adv. vult.*)

SOMERVELL, L.J., in a written judgment, said that, as the word " arises " in s. 89 (1) meant, as explained in *Hales* v. *Bolton Leathers, Ltd.* [1950] 1 K.B. 493; *ante* p. 130, " arises at any time," the workman would be entitled to workmen's compensation unless that compensation were excluded by the exception to s. 89 (1). The effect of that exception was that the Workmen's Compensation Acts should not continue to apply even though the right to compensation were in respect of employment before the appointed day if two conditions were fulfilled, namely, (1) that the right arose on or after the appointed day and (2) that the workman had been insured against the disease under the Act of 1946. The first condition was fulfilled here because the right to compensation had arisen after the appointed day (though in respect of employment before that day) whether the date of disablement or the date of certificate were regarded. Although the workman was insured in respect of his employment as a woodworker, his pneumoconiosis was not due to the nature of his woodworking employment, so that he was, by virtue of s. 55 (1), not insured against pneumoconiosis under the Act of 1946. The second condition of the exception to s. 89 (1) was accordingly not fulfilled. As the exception did not apply, he was entitled to workmen's compensation from his former employers in respect of this disease. *Harris* v. *Rotol, Ltd.* (1950), *ante*, p. 238; 66 T.L.R. (Pt. 1) 887, decided only that, where a certificate of disablement was given after the appointed day, 5th July, 1948, but gave as the date of disablement a day before 5th July, 1948, the right to compensation arose when the certificate was given because s. 43 of the Workmen's Compensation Act, 1925, made the certificate a condition precedent to receipt of compensation. The appeal should be allowed.

DENNING, L.J., read a judgment agreeing that the appeal succeeded, and BUCKNILL, L.J., agreed.

APPEARANCES: *Gilbert Paull*, K.C., *A. E. James* and *M. Gore* (*Stafford Clark & Co.*, for *Hooper & Fairbairn*, Dudley); *F. W. Beney*, K.C., and *E. G. H. Beresford* (*E. P. Rugg & Co.*, for *Buller, Jeffries & Kenshole*, Birmingham); *J. P. Ashworth* (*Solicitor, Ministry of National Insurance*) (*amicus curiae*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

DIVISIONAL COURT

SHIPPING: VESSEL "WHICH CARRIES MORE THAN TWELVE PASSENGERS"

Duncan *v.* Graham and Others

Lord Goddard, C.J., Hilbery and Byrne, JJ.
14th July, 1950

Case stated by the Recorder of Berwick-on-Tweed.

Informations were preferred by the appellant against the three respondents, the owner and master of one engine-driven fishing vessel, and a company owning a second such vessel, charging them with carrying passengers on the vessels when they had not been surveyed or certified by the Board of Trade, contrary to s. 271 of the Merchant Shipping Act, 1894. The justices convicted and fined the defendants, who appealed to quarter sessions. The vessels in question were used on a special occasion to convey more than twelve passengers, each gratis, the crew also not being paid for the voyages. By s. 267 of the Merchant Shipping Act, 1894, " ' passenger steamer ' shall mean every British steamship carrying passengers . . ." By s. 271 (1) survey is required of " every passenger steamer which carries more than twelve passengers." The recorder allowed the appeals, and the prosecutor now appealed.

LORD GODDARD, C.J., said that the words " carrying passengers " in s. 267 seemed to indicate a ship either constructed to carry passengers or used for the carriage of passengers; they did not mean a ship which, although a cargo ship or a fishing vessel, on some particular occasion, took passengers for a trip down the river, for example. It was not possible to make sense of s. 271 unless the words " every passenger steamer which carries more than twelve passengers " were read as meaning that the steamer had first to be a passenger steamer, that was to say, one that was either used habitually, or at any rate substantially, for carrying passengers, or was constructed for carrying passengers. It must be shown that the vessel was a passenger steamer quite apart from whether she had twelve passengers on board or more. If she were a passenger steamer and carried more than twelve passengers on board, she must not go to sea with any number of passengers unless properly certified; but she must first be a passenger steamer which carried more than twelve passengers—was constructed or used for the purpose of carrying more than twelve. The recorder found, as it was clearly open to him to find, that these vessels were fishing boats. It was not possible to interfere with his finding, and the appeal failed.

HILBERY and BYRNE, JJ., agreed. Appeal dismissed.

APPEARANCES: *Colin Pearson*, K.C., and *J. P. Ashworth* (*Treasury Solicitor*); *G. R. Hinchcliffe*, K.C., and *J. H. Robson* (*Keenlyside & Forster*, Newcastle-on-Tyne).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

MOTOR INSURANCE: TRACTOR DRAWING TRAILERS

Leggate *v.* Brown

Lord Goddard, C.J., Hilbery and Byrne, JJ. 19th July, 1950

Case stated by Lincolnshire justices.

An information was preferred against the appellant, a farmer, charging him with unlawfully using a motor tractor, there not being then in force in relation to its use a third-party policy of insurance, contrary to s. 35 (1) of the Road Traffic Act, 1930. The farmer drove his tractor with two trailers loaded with straw attached along a public highway. He held a third-party policy of insurance in respect of the tractor expressed to be operative " whilst the vehicle . . . was being used with not more than two trailers attached to it at any one time." The farmer did not know that he was committing an offence in driving the tractor on a highway with two laden trailers attached to it. The prosecution contended that in so doing he was contravening s. 18 (1) (*b*) of the Road Traffic Act, 1930; that the insurance policy was, therefore, void as being contrary to public policy; and that there was therefore no valid policy in force in relation to the user of the tractor. The justices accepted that contention and convicted and fined the farmer, who now appealed.

LORD GODDARD, C.J. delivering the judgment of the court, said that the justices were clearly wrong. The policy did not insure the farmer against the consequences of his using the tractor as he did but against the consequences of negligent driving. A third party could only claim under it in respect of negligent driving; and, if so, it mattered not whether

there were two laden trailers behind the tractor or not. Appeal allowed.

APPEARANCES: *Niall MacDermot* (*Lee, Bolton & Lee*, for *Roythorne & Co.*, Boston); *T. R. F. Butler* (*Theodore Goddard and Co.*, for *Dyer, Marris & Frost*, Boston).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

NUISANCE: NATURAL OBSTRUCTION IN WATERCOURSE

Neath Rural District Council *v.* Williams

Lord Goddard, C.J., Hilbery and Byrne, JJ.
21st July, 1950

Case stated by Glamorgan justices.

The defendants were the owners and occupiers of land traversed by a mountain stream. At a sharp turn in its course obstructions had been caused by a deposit of boulders, silt and other debris brought down by the stream, with the result that in time of heavy rain flooding occurred which occasioned discomfort to those living in the neighbourhood. A complaint was preferred by the rural district council to a court of summary jurisdiction under the Public Health Act, 1936, that a nuisance existed in part of a watercourse; that notices to abate the nuisance had been served on the defendants under s. 93 in Pt. III of the Act and s. 259, as being the persons by whose act or default the nuisance arose or continued; but that the defendants had made default in complying with the requirements of the notices. The justices were not satisfied on the evidence that the defendants had done anything or neglected to do anything which caused the flooding, and they dismissed the complaint. The rural district council appealed.

LORD GODDARD, C.J., said that it was important to observe that, whereas in the case of the statutory nuisances with which s. 92 of the Public Health Act, 1936, was concerned, the local authority could, under s. 93, proceed against a person who had *suffered* a nuisance to continue, if the nuisance were a choked watercourse s. 259 placed no liability on any person unless the nuisance arose or continued from his act or default. *Hodgson* v. *York Corporation* (1873), 28 L.T. 836 was a clear authority for the view that the owner of the bed of a stream was not under any obligation at common law to remedy the natural and gradual silting up of the stream, and it made no difference whether the silting was caused in one way or another. Sections 35 and 57 of the Land Drainage Act, 1930, on which the council relied, were of no assistance here. "Default" in the present connection did not mean merely doing nothing unless an obligation to do something were imposed by the Act. There was no act by the defendants which caused the obstruction either to arise or to continue. It could well be understood that there might be circumstances in which a person, in failing to do something which he ought to do, as, for instance, preventing obstructive matter from going into a river, might be said to cause the obstruction by his default. In the present case, on the facts found by the justices, there was nothing to show that the defendants did anything which caused the obstruction to arise or continue; nor was there anything which could be called a default. There might have been facts which amounted to sufferance by them, but sufferance was excluded from the particular section concerned. The appeal failed.

HILBERY and BYRNE, JJ., agreed. Appeal dismissed.

APPEARANCES: *Rowe Harding* (*Sharpe, Pritchard & Co.*, for *T. D. Windsor Williams*, Neath); *H. V. Brandon* (*Seeley and Son*, for *Lewis C. Thomas, Son & Blazey*, Neath).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Additional Import Duties (No. 2) Order, 1950. (S.I. 1950 No. 1388.)

County Council of the County of Kinross (Kinneswood) Water Order, 1950. (S.I. 1950 No. 1403.)

Grassland Fertilisers (Scotland) Scheme, 1950. (S.I. 1950 No. 1394.)

Import Duties (Exemptions) (No. 7) Order, 1950. (S.I. 1950 No. 1387.)

Imported Softwood Prices (Amendment) Order, 1950. (S.I. 1950 No. 1385.)

Injurious Weeds (Delegation to County Agricultural Executive Committees) Regulations, 1950. (S.I. 1950 No. 1376.)

Local Government (Allowances to Members) (Prescribed Bodies) (Scotland) Regulations, 1950. (S.I. 1950 No. 1379.)

Pelts (Maximum Prices) Order, 1950. (S.I. 1950 No. 1378.)

Retail Drapery Outfitting and Footwear Trades Wages Council (Great Britain) Wages Regulation Order, 1950. (S.I. 1950 No. 1380.)

Safeguarding of Industries (Exemption) (No. 9) Order, 1950. (S.I. 1950 No. 1389.)

Utility Apparel (Maximum Prices and Charges) Order, 1949 (Amendment No. 10) Order, 1950. (S.I. 1950 No. 1372.)

NOTES AND NEWS

Honours and Appointments

The Lord Chancellor has appointed Mr. HAROLD WILLIAM PATON, D.S.C., to succeed Judge Wethered, O.B.E., as judge of the county courts on Circuit 54 (Bristol, etc.) on 1st September.

The following barristers have been appointed additional members of the judicial staff (civil) of the Judge Advocate General of the Forces (Lord Chancellor's establishment): as Assistant Judge Advocates General Messrs. B. de H. PEREIRA, B. K. FEATHERSTONE, F. H. DEAN, O. BERTRAM; as Deputy Judge Advocates Messrs. P. J. H. HEYCOCK, C. E. DEPINNA, A. E. McDONALD, W. E. STUBBS, M.B.E.; as Legal Assistant Mr. E. D. T. MARTIN.

Personal Notes

Mr. J. L. Bowron, solicitor, of Stockton-on-Tees was married on 19th August to Miss Patricia Cobby, barrister-at-law, of Worthing.

Miscellaneous

THE SOLICITORS' MANAGING CLERKS' ASSOCIATION

A series of lectures for junior law clerks has been arranged for the coming winter. They will be given in the Lord Chief Justice's Court each Monday at 6.15 p.m. commencing on 2nd October, 1950. The subjects to be dealt with are "Practice and Proceedings in the King's Bench, Chancery and Divorce Divisions," "Conveyancing" and "Costs." Prints of the synopsis, giving full details and the fees payable, are now available at the offices of the Association at Maltravers House, Arundel Street, Strand, W.C.2.

THE SOLICITORS ACTS, 1932 to 1941

On the 28th day of July, 1950, an order was made by the Disciplinary Committee constituted under the Solicitors Acts, 1932 to 1941, that there be imposed upon GEOFFREY HOWARD STEVENS, of No. 7 North Hill Terrace, Tavistock Road, Plymouth, in the County of Devon, a penalty of £50, to be forfeit to His Majesty, and that he do pay to the complainant his costs of and incidental to the application and inquiry.

"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertising Offices: 88–90, Chancery Lane, London, W.C.2. Telephone: Holborn 1403.

Annual Subscription: £3 inclusive (payable yearly, half-yearly or quarterly in advance).

Advertisements must be received first post Wednesday.

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